COPY
Office-Supreme Court, U.S.
FILED
NOV 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-346

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

vs.

ESMAIL YERMIAN, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES R. DUNN
Federal Public Defender
STEPHEN J. HILLMAN
Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-4103
FTS 798-4103

Attorneys for Respondent
ESMAIL YERMIAN

TABLE OF CONTENTS

	Page
Table of Authorities Cited	ii
RESPONDENT'S BRIEF IN OPPOSITION	
I. QUESTION PRESENTED	1
CAN A PERSON BE CONVICTED OF MAKING A FALSE STATEMENT TO THE UNITED STATES GOVERNMENT WITHOUT PROOF THAT HE KNEW HIS STATEMENT WAS BEING MADE TO THE UNITED STATES GOVERNMENT?	1
II. STATEMENT OF THE CASE	1
III. REASONS FOR DENYING THE WRIT	4
IV. CONCLUSION	8
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF MAILING	11

TABLE OF AUTHORITIES

Cases	Page
United States v. Baker, 626 F.2d 512 (5th Cir. 1980)	5, 6
United States v Candella, 482 F.2d 1223 (2d Cir. 1973)	7
United States v. Cella, 568 F.2d 1266 (9th Cir. 1978)	7
United States v. Hooper, 596 F.2d 219 (7th Cir. 1979)	7
United States v. Kraude, 467 F.2d 37 (9th Cir.), cert. denied 415 U.S. 977 (1974)	7
United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)(per curiam)	5, 6
United States v. Matanky, 482 F.2d 1319 (9th Cir.) cert. denied, 414 U.S. 1039 (1973)	7
United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979)	5, 6
United States v. YERMIAN, 708 F.2d 365 (9th Cir. 1983)	5, 6

RESPONDENT'S BRIEF IN OPPOSITION

Respondent ESMAIL YERMIAN respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 708 F.2d 365.

I.

QUESTION PRESENTED

CAN A PERSON BE CONVICTED OF MAKING A FALSE STATEMENT TO THE UNITED STATES GOVERNMENT WITHOUT PROOF THAT HE KNEW HIS STATEMENT WAS BEING MADE TO THE UNITED STATES GOVERNMENT?

II.

STATEMENT OF THE CASE

Respondent ESMAIL YERMIAN was convicted on three counts of making a false statement in a matter within the jurisdiction of a federal agency in violation of 18 U.S.C. 1001, following a jury trial in the United States District Court for the Central District of California. He received a five year sentence with probation after the first six months. The Court of Appeals reversed his conviction.

The factual background of the case as presented by the government is not disputed, except where noted in the following discussion.

In April 1979, when respondent YERMIAN was newly employed as an engineer at Gulton Industries, a private firm, he was asked by Ruby Lane, security officer for Gulton Industries, to fill out a worksheet for preparation of a

personnel security questionnaire. After petitioner had filed out the worksheet, with the assistance of the instruction sheet and after Ms. Lane had added certain information based on conversations with petitioner, she typed a Personnel Security Questionnaire. Then YERMIAN completed the confidential section, Section 3, and returned it to Ms. Lane for mailing.

Sometime later, Ms. Lane typed up a Personnel Security Questionnaire using information he had previously supplied and brought it to YERMIAN for signature. He completed the confidential information and she observed him to place it in the pre-addressed envelope for mailing. Petitioner YERMIAN testified that he did not recall placing the form in any envelope.

In the information that petitionner had furnished to Gulton, he stated that he had worked for Square D Company from 1971 to 1973, and for Bell Helicopter in Houston from 1975 to 1979. He also listed no felony convictions. Through stipulation, testimony was received that Square D Company showed no employment records for the respondent for the period of June 1971 through March 1973, and that Bell Helicopter International showed no employment record for the period from February 1975 through March 1979. It was further stipulated that respondent YERMIAN was the same person referred to in the May 4, 1978 Judgment and Commitment Order Counts 1, 2, and 3 respectively were based on YERMIAN's false statements regarding his conviction and his employment by Bell and Square D in Exhibit 3.

The defense presented was that petitioner YERMIAN did not know that the false statements he was making were being made to a government agency. All three false statements

were first made on an application for employment with Gulton Industries. Respondent was at that time unemployed, felt desperate to get a job, and made the statements to enhance his chances for employment. When respondent was given the worksheet, he felt that he would be fired if he did not give the information he had previously given in his employment application. His understanding of the purpose of the worksheet was that the information was going to be used by Gulton for purposes of classifying employees. He did not know that the information would be sent to the Department of Defense, or to any other government agency, nor had he been told that by any person.

Respondent had not ever applied for a Department of Defense Security clearance before, nor was he familiar with procedures for getting a security clearance. He was simply told that the form was a personnel security questionnaire, and that he should fill it out. He had not known that he would have to obtain a security clearance as a condition of his work at Gulton.

When the typed version of the Security questionnaire brought to Respondent, he looked it over only very quickly. He did this both because he trusted that Ms. Lane had typed the information that he had given on the worksheet, and because he was being paged at that moment for a meeting with his supervisor. He did not read over any of the fine print in Part 4. At the time he signed this form, he still had no belief that the form would be submitted to the Department of Defense, and believed it was only for internal Gulton purposes.

At some time later, when Respondent YERMIAN was brought the typed security questionaire filed out Part 3, and again

signed it. He did not read it over carefully, because it contained essentially the same information as earlier forms he had filled out. At the time he signed this form, respondent YERMIAN did not know that the information would be sent to any agency of the United States Government.

YERMIAN first learned of the true purpose of this form when Ms. Lane told him that his security clearance had been denied. Sometine after that, he was contacted by agents of the Federal Bureau of Investigation. He truthfully discussed with them his previous employment and convictions. He was truthful with them, as he had not been in answering the forms, because he now knew he was talking to government agents rather than a private like Gulton.

At trial, the jury was erroneously given an instruction that YERMIAN should be convicted if they concluded that he knew or should have known that the information was to be submitted to a government agency, (emphasis added). Respondent objected to this instruction at the trial level as it did not satisfy the intent requirement of Section 1001.

The Court of Appeals reversed, construing Section 1001 to require proof beyond a reasonable doubt of actual knowledge of federal involvement.

III.

REASONS FOR DENYING THE WRIT

The Government argues that its petition should be granted because the Court of Appeals holding has created a direct conflict with three decisions of the Fifth, Sixth and Seventh Circuits, which, when presented with cases clearly distinguishable on their facts, held that Section 1001 does not require actual knowledge of federal involvement. See

United States v. Baker, 626 F.2d 512 (5th Cir. 1980); United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)(per curiam); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).

In spite of the Government's contention, the decision by the Court of Appeals of the Ninth Circuit has not created a conflict with decisions rendered in other circuits. In United States v. YERMIAN, 708 F.2d 365 (9th Cir. 1983), the court was confronted with a problem distinctly different from the usual case as represented by Baker, Lewis and Stanford. Thus, what is allegedly a conflicting decision is actually distinguishable on its facts.

In YERMIAN, the respondent furnished false information in an application to a private company because he was unemployed and desperate to get a job. Later, he was asked to fill out a personnel security questionnaire which he assumed was for internal use only. In completing the questionnaire, he again provided the same false information so that all the documents he had completed for his employer would be consistent. YERMIAN was completely unaware that the company intended to send the security questionnaire to the federal government, but when they did so, under the interpretation of the district court, his conduct became criminal.

In Baker, Lewis and Stanford, the respective courts were faced with an entirely different problem. These cases represent the most typical type of prosecution under Section 1001. In each instance the specific aim of the defendant was to obtain funds from a federal source by fraudulent means. Thus, both the intent and the conduct in question was very different from that of respondent YERMIAN.

In United States v. Stanford, 589 F.2d 285, 297 (7th Cir.), cert. denied, 440 U.S. 983 (1979), the defendant wanted to get A.F.D.C. money even though employed and ineligible. She did this by applying for the federal money through the Illinois Department of Public Aid.

In United States v. Lewis, 587 F.2d 854 (6th Cir. 1978) (per curiam), the defendant against sought A.F.D.C. money though not entitled to it. She accomplished this by submitting false information to the Michigan Department of Social Services.

In Baker, Lewis, and Stanford, the Fifth, Sixth and Seventh Circuits found that knowledge of federal involvement was not required to sustain a conviction under Section 1001, because, as noted by the Court of Appeals for the Ninth Circuit, the cases "involved a direct attempt by a defendant to obtain funds from a federal source by fraudulent means." United States v. YERMIAN, 708 F.2d 365, 367 (9th Cir. 1983) Therefore, in those instances knowledge of federal involvement was conclusive. This necessitated a different application of Section 1001 than a case such as that of respondent YERMIAN who was not actively practicing monetary fraud upon the federal government.

Another frequently litigated type of Section 1001 case is one in which the defendant claims he is not liable under the statute because he did not make his false claim directly to the federal government and so his statement was not one

Third, Eight and Ninth Circuits, have found the defendants liable as did the Baker, Lewis, and Stanford courts. See United States v. Hooper, 596 F.2d 219 (7th Cir. 1979), United States v. Cella, 568 F.2d 1266 (9th Cir. 1978), United States v. Kraude, 467 F.2d 37 (9th Cir.), cert. denied 415 U.S. 977 (1974), United States v. Matanky, 482 F.2d 1319 (9th Cir.) cert. denied, 414 U.S. 1039 (1973), United States v Candella, 482 F.2d 1223 (2d Cir. 1973).

Thus, in cases where federal funds are sought from the United States Government in a manner making knowledge of the source conclusive, the various circuits including the Ninth Circuit have all applied the statute consistently without giving rise to any conflict.

In YERMIAN v. United States, 708 F.2d 365 (9th Cir. 1983), the Court of Appeals was dealing with a completely different problem. The defendant was not seeking funds the source of which made his knowledge of federal involvement nearly conclusive. Instead, the Court was asked to decide whether they thought it was appropriate to criminally punish under Section 1001, an individual who thought he was merely completing an internal Security questionnaire. The court found it inappropriate that his conduct should be transformed into criminal behavior because of the mere fortuity, that unbeknownst to him, his employers would forward the paperwork to the federal government.

YERMIAN does not present the usual factual setting which courts encounter in Section 1001 litigation. More

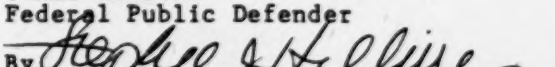
so until it meets with a more appropriate case.

IV.

CONCLUSION

In summary, the writ for the petition for certiorari should be denied because the allegedly conflicting decisions are distinguishable on their facts and because this is not the case in which to further construe the requirements of Section 1001.

JAMES R. DUNN
Federal Public Defender

DATED: October 31, 1983 By 
STEPHEN J. HILLMAN
Deputy Federal Public Defender

Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-4103
(FTS) 798-4103

No. 83-346

UNITED STATES OF AMERICA, PETITIONER

vs.

ESMAIL YERMIAN, RESPONDENT

MOTION FOR LEAVE TO PROCEED

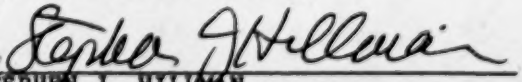
IN FORMA PAUPERIS

The respondent, ESMAIL YERMIAN, by his undersigned counsel, asks leave to file the attached Response In Opposition to A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender was appointed as counsel for Mr. YERMIAN in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006(A)(d).

This motion is brought pursuant to Rule 46.1 of the Rules of the Supreme Court of the United States.

JAMES R. DUNN
Federal Public Defender

DATED: October 31, 1983

By 
STEPHEN J. HILLMAN
Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-4103
(FTS) 798-4103

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

vs.

ESMAIL YERMIAN, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 1983, a copy of Motion for Leave to Proceed in Forma Pauperis and Response In Opposition to A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitior General of the United States, Department of Justice, Washington, D. C. 20530, counsel for the respondent.

DATED: October 31, 1983

JAMES R. DUNN
Federal Public Defender
By Stephen J. Hillman
STEPHEN J. HILLMAN
Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-4103
(FTS) 798-4103

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

vs.

ESMAIL YERMIAN, RESPONDENT

CERTIFICATE OF MAILING

I, STEPHEN J. HILLMAN, a member of the Bar of this Court, hereby certify that to the best of my knowledge, the attached Response in Opposition to Petition for a Writ of Certiorari was deposited in a United States Post Office or mail box, with first class postage pre-paid and properly addressed to the Clerk of the Court on October 31, 1983, within the permitted time for filing this Petition.

JAMES R. DUNN
Federal Public Defender

By Stephen J. Hillman
STEPHEN J. HILLMAN
Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-4103
(FTS) 798-4103

SUBSCRIBED AND SWORN to before me this 31st day of October, 1983.

Sally M. Maiorca

OFFICIAL SEAL
SALLY M. MAIORCA
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires June 20, 1986